90-576

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

PHILIPPINES, MICRONESIA & ORIENT NAVIGATION COMPANY,

*Petitioner,*

vs.

NYSA-ILA PENSION TRUST FUND, THE BOARD OF TRUSTEES OF THE NYSA-ILA PENSION TRUST FUND, THE NEW YORK SHIPPING ASSOCIATION, THE NYSA-ILA FRINGE BENEFIT ESCROW FUND, THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL-CIO),

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether withdrawal liability under section 4201(a) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1381(a), can be assessed by a multiemployer pension plan against an entity that is not, in any sense, the "employer" of any of the plan's participants?

2. Whether the terms "employer" and "obligation to contribute" as used in section 4203(a) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1383(a), applies to a company which merely made payments to an industry association that were commingled with that association's general funds, from which the association, from time to time, contributed to a multiemployer pension plan?

3. Whether a claim for payment of withdrawal liability can be judicially enforced where the contractual obligation on which it is based is the direct result of a "hot cargo" agreement violating section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(e)?

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner,[1] PM&O,[2] respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the proceeding on July 11, 1990 and reported at 909 F.2d 39 (2d Cir. 1990).

### Opinions Below

The opinions of the United States Court of Appeals, 909 F.2d 39 (2d Cir. 1980) and United States District Court of the Southern District of New York appear in the Appendix hereto.

### Statement of Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 11, 1990, and this Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the court below was invoked under 28 U.S.C. § 1331 and 29 U.S.C. §§ 1132(a)(1), 1451(a) and (c).

### Statutory Provisions Involved

I. ERISA § 4201(a), 29 U.S.C. § 1381(a):

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

II. ERISA § 4203(a), 29 U.S.C. § 1383(a):

> For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

---

[1] Pursuant to Rule 29.1. Petitioner PM&O declares that it has no parent corporation and only wholly owned subsidiaries.

[2] In this petition, petitioner (plaintiff below) Philippines Micronesia & Orient Navigation Company is referred to as "PM&O"; respondent (defendant below) International Longshoremen's Association as "ILA"; respondent (defendant below) New York Shipping Association as "NYSA"; respondent (defendant below) the NYSA-ILA Pension Trust Fund as the "Pension Fund"; the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, as "ERISA"; the Multiemployer Pension Plans Amendments Act, P.L. 96-346, September 26, 1980, as "MPPAA"; and the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, as "NLRA."

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

III. ERISA § 4212(a), 29 U.S.C. § 1392(a):

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising -

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

IV. NLRA § 8(e), 29 U.S.C. § 158(e):

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void [.]

## Statement Of The Case

Petitioner, PM&O, chartered ships which called at the Port of New York between 1979 and 1985. Petitioner's cargo was unloaded by longshoremen employed by Maher Terminals in New York.PM&O never employed a single longshoreman (or the ship's crew) and never made a single payment to the longshoremen's Pension Fund.

In 1986, petitioner chose to cease doing business in the Port of New York. The ILA brought an unfair labor practice charge alleging an unlawful refusal to bargain, but an NLRB Regional Director refused to issue a complaint, finding that PM&O was not an employer of longshoremen in the Port of New York for the purposes of the National Labor Relations Act. That decision was never appealed.

Nevertheless, in 1986, the longshoremen's Pension Fund claimed that PM&O was an employer of ILA longshoremen and a Fund contributor solely by virtue of "tonnage assessments" it had paid to NYSA (not the Pension Fund). NYSA claimed that the tonnage assessments it collected were merely a "collection mechanism" to fund NYSA obligations, including NYSA's obligation to contribute to the Pension Fund. NYSA "deemed" that approximately $527,000 of NYSA's contribution to the Pension Fund to have been made by PM&O. On that basis, the Pension Fund asserted that PM&O owed over $788,000 as withdrawal liability, solely because PM&O stopped shipping cargo to the Port of New York.

PM&O brought this action against the union (ILA), the Pension Fund and its trustees, and an employer association (NYSA), of which PM&O was never a member, that had negotiated the operative collective bargaining agreement with the ILA. PM&O sought a declaratory judgment that it does not owe withdrawal liability because: (1) PM&O is not and never was an "employer," within the meaning of Section 4201(a) of ERISA, of longshoremen-participants of the Pension Fund; (2) PM&O never had an obligation to contribute and never did contribute to the Pension Fund; and (3) the collective bargaining agreement provided that only NYSA makes contributions to the Pension Fund. PM&O also alleged that because the operative agreements violated section 8(e) of the NLRA (the "hot cargo" prohibition), it was not obligated to pay withdrawal liability and was, in fact, entitled to a refund under the "mistake of fact and law" provision of ERISA § 403, 29 U.S.C. § 1103.

On summary judgment motion, without trial, the District and Circuit courts below ruled that PM&O was an "employer" under ERISA § 4203(a) because "PM&O assumed an obligation to contribute to the NYSA-ILA pension fund." The Circuit Court utilized the broad definition of "employer" previously adopted in *Korea Shipping* v. *NYSA - ILA Pension Trust Fund*, 880 F.2d 1531 (2d Cir. 1989), thus rejecting as irrelevant that PM&O was not an "employer" under the common law or any other established meaning of that term. These courts also refused to consider PM&O's "hot cargo" claim.

PM&O contends that this "contributing obligor" definition of "employer" adopted by the Second Circuit is improper. The MPPAA test is at least two fold: withdrawal liability is imposed

only if an "employer" ceases to have "an obligation to contribute." The courts below seemed to combine these two distinct concepts into a single test, contrary to the Congressional enactment. The courts also ignored the long-standing rule of statutory interpretation to apply the plain meaning of "employer." Instead, the courts adopted a broader definition which in effect writes the term "employer" out of the statute.

## Statement Of Facts[3]

### 1. *PM&O*

Starting in 1979, PM&O chartered vessels from independent shipowners to transport cargo from the Orient for its customers to the Port of New York. (J.A. 1183-84).[4] PM&O neither owned nor operated any of the ships; instead, PM&O chartered ships from shipowners who provided the ships and employed the crews. (J.A. 1184). On arrival in the Port of New York, the ships were unloaded by a stevedore company which was in no way related to PM&O. (J.A. 1184).

### 2. *PM&O Engaged A Stevedore Company For The Ports Of New York And Baltimore*

PM&O engaged a particular stevedore company, Maher Terminals, to unload its cargo in the Ports of New York and Baltimore. (J.A. 1184-85; J.A. 227). PM&O signed similar agreements[5] with Maher to provide stevedore services in both ports. *(Id.)* PM&O's relationship with Maher was simply one of a customer

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[3] As the judgment below was granted upon a summary judgment motion, "the evidence of the non-movant [petitioner] is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

[4] References to the Joint Appendix in the Court below are referred to herein by page number as ("J.A. ____"). References to the decisions below reprinted in the Appendix hereby are referred to as ("A- ____").

[5] The contracts for both ports are identical in all relevant parts. (J.A. 628-45; J.A. 646-55). Both contracts require PM&O to subscribe to local collective bargaining agreements and pay certain tonnage assessments. (J.A. 228; J.A. 628-45; J.A. 646-55). Interestingly, although the contracts are structured in exactly the same way, no one in the Port of Baltimore has alleged that PM&O, by paying such assessments, is an employer or that it assumed an obligation to contribute to an ILA pension plan. (J.A. 227).

contracting for services.[6] (J.A. 611). PM&O never understood and was never told that it was undertaking any obligation to contribute to the pension fund for Maher's employees. (J.A. 611; J.A. 613-15; J.A. 713-14).

Maher unloaded PM&O cargo from the chartered ships using Maher employees. (J.A. 1184). PM&O paid a specified rate for "stevedoring and terminal services per container" and separately paid charges for overtime work, extra labor and penalty wages for Maher's employees. (J.A. 629-30, 635).

PM&O never employed a single longshoreman. (J.A. 1184-85). Maher Terminals hired and paid the wages of its longshoremen, established their work schedules specifying the exact manner and means through which the stevedoring work was to be performed with its own supervisors, and used its own equipment and supplies. (J.A. 1184).

The Maher agreement provided that:

> Carrier agrees to sign N.Y.S.A./I.L.A. Labor Agreement for the period covered by this Contract and to pay the prevailing tonnage and J.S.P. assessments and container royalties which may be due. (J.A. 632).

This provision contains no references to Pension Fund contributions, and tonnage assessments were to be paid to NYSA (not to any fund). (J.A. 1140).

For the convenience of Maher, the contract also provided that the "Line" shall pay "the following charges . . . directly to the NYSA-ILA Funds" specified as the "GAI and Fringe Benefits,"[7] "JSP," and "Container Royalty Fund." (J.A. 638).

There is nothing in the Maher contract and nothing was said by any Maher employee in New York (or Baltimore) that PM&O assumed any responsibility or "obligation to contribute" to the

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[6] The agreement was solely between Maher Terminals and PM&O. This stevedoring contract was not a "collective bargaining agreement" but instead a "stevedore and terminal service" contract in which PM&O hired Maher for its stevedoring services. (J.A. 577).

[7] The NYSA-ILA Fringe Benefit Escrow Fund is a separate fund to pay medical and similar benefits and has nothing whatsoever to do with pensions or the NYSA-ILA Pension Fund. (J.A. 342-43).

longshoremen's Pension Fund (J.A. 611, 613-15). In fact, as stipulated by defendants, PM&O never paid one red cent directly to the Pension Fund. (J.A. 716).

3. *NYSA*

In the Port of New York, collective bargaining is conducted between the ILA on behalf of the longshoremen and NYSA, an employer association including certain carriers, stevedores, and other employers in the port. (J.A. 335).

NYSA's Board of Directors negotiates, approves and administers the longshore contracts. (J.A. 336-37). NYSA's directors act as management negotiators at the bargaining table, management trustees on all longshore employee benefit funds and management representatives on all labor relations committees involved in the implementation of all aspects of the longshore labor contract. (J.A. 337).

4. *PM&O Was Never A Member Of NYSA*

PM&O was never a member of the NYSA. (J.A. 1185; J.A. 988).[8]

Because PM&O was not a NYSA member, it had no say whatsoever in the manner in which NYSA bargained with the ILA, or in the manner in which NYSA administered the contract, the various employee benefit funds, or the terms and conditions of any of its contractual agreements. (J.A. 1185; J.A. 335).

5. *PM&O Was Forced To Subscribe To The NYSA-ILA Master Contract And General Cargo Agreements*

In order to have the ships it chartered unloaded in the Port of New York, PM&O was informed by Maher Terminals that it was required to "subscribe" to the NYSA-ILA Collective Bargaining Agreements, which include the General Cargo and Master Contract Agreements. (J.A. 1185; J.A. 699; J.A. 597). Otherwise, no longshoreman would provide labor to PM&O's chartered ships. (J.A. 1185).

The General Cargo Agreement between NYSA, of which Maher was a member, and the ILA reinforces this threat, providing that:

---

[8] Both Delta Steamship Lines, Inc., Korea Shipping Corp. and Transportation Martima Mexicana, S.A., the carriers in question in the *Korea Shipping* and *Bowers* cases were members of NYSA. *Korea Shipping*, 880 F.2d at 1534; *Bowers* v. *Transportacion Martima Mexicana*, 901 F.2d 258, 260 (2d Cir. 1990).

> If any carrier does not subscribe to this Agreement and the appended JSP Agreement, the ILA shall have the right not to work on the loading and discharging of its ships or any work ancillary thereto. (J.A. 1144).
>
> Moreover, the 1984 Subscription Agreement states:
>
> Should any carrier fail or refuse to sign . . . this Agreement . . . then and in that event . . . the ILA shall have the right to refuse to supply labor and to picket or otherwise hinder the operation of the steamship carrier to the full extent permitted by applicable law. (J.A. 477).

Thus, although PM&O was completely unrelated to the NYSA and the ILA and employed no one in the Port of New York (neither sailor nor longshoreman), as a prerequisite to having Maher's longshore employees unload its cargo, PM&O was required to subscribe to the NYSA-ILA General Cargo and Master Contract Agreements. (J.A. 1185).

However, PM&O never signed the Master Contract or General Cargo Agreements; it only signed Subscription Agreements. (J.A. 1185; J.A. 473-80).

No one told PM&O that by subscribing to those agreements it had obligated itself to make pension contributions. All that the agreements ever said – and all that PM&O understood them to mean – was that PM&O had to pay a tonnage assessment directly to NYSA (not the Pension Fund). (J.A. 614-615; J.A. 714).

What is even more egregious is that PM&O was never allowed to see the underlying NYSA-ILA General Cargo and Master Contract Agreements until it demanded these documents in this action's discovery proceedings. (J.A. 702).

6. *No Agreement Signed By PM&O Obligated It To Make Any Pension Contributions*

The Subscription Agreements PM&O signed do not say that PM&O agreed to assume any obligation to contribute to any pension fund.

The Subscription Agreement, dated May 22, 1978, states:

> . . . each carrier must subscribe to the NYSA-ILA collective bargaining agreement (including, without limitation, those

> provisions relating to the contribution of its proportionate share of the hourly and tonnage contributions provided in the said collective bargaining agreement) .... (J.A. 473).

The Subscription Agreement that PM&O signed in 1984 provides:

> Nothing contained herein shall require any carrier to be liable for any contributions to any ILA fringe benefit funds not required to be paid by such carrier, if it employs a stevedore who has given sufficient surety to pay such stevedore contributions to such funds if the carrier has paid the stevedore under the stevedoring contract. (J.A. 477).

Even if PM&O had been given the NYSA-ILA agreements to review, PM&O would have found that these agreements imposed the obligations to contribute to the welfare and pension funds upon NYSA and its members. The General Cargo Agreement provides in Part V(b) that:

> Pension Benefits: The employer's contribution to the NYSA-ILA Pension Fund shall be set forth in paragraph 3 of the master contract (May 27, 1980) (annexed (G)) and part VI (6) hereinafter. (J.A. 1094).

The General Cargo Agreement defines employers as:

> members (hereinafter referred to as Employers or Employer Members) of the New York Shipping Association, Deepwater Steamship Lines and member stevedores of the Port of New York. (J.A. 725, 1082).

PM&O was not a member of either of these groups and was not an employer as the term is defined in that Agreement. Further as it is clear that PM&O was not an employer of longshoremen under the common law or the NLRA, PM&O was not obligated under the clear terms of the Agreement or under common law or labor law to contribute to the Pension Fund.

Pursuant to the General Cargo Agreement, the only thing required to be paid were "tonnage assessments" to NYSA. NYSA used the tonnage assessment to pay NYSA's own operating expenses, as well as contributions to funds for variety of benefits for Maher's longshoremen, including vacations, holidays, welfare

clinics and supplemental cash benefits. (J.A. 1140). Thus, at most, PM&O paid assessments which were used to defray a variety of costs; it did not agree to make pension payments on behalf of employees of the stevedore company it hired.[9]

7. *PM&O Never Contributed Money To The NYSA-ILA Pension Plan*

PM&O never made a single payment to the NYSA-ILA Pension Fund. (J.A. 1186; J.A. 715-16). Defendants readily admit this having stipulated during discovery that "[n]o payments were ever made by PM&C to the ILA Pension Fund." (J.A. 716).

The General Cargo Agreement provides: "Pension payment shall be made by NYSA directly to the NYSA-ILA Pension Trust Fund." (J.A. 1140). The contract never links the assessment to NYSA's pension contribution.

The amount that NYSA is obligated to contribute is likewise set forth in the General Cargo Agreement as a guaranteed annual sum that has no correlation whatsoever to the amounts NYSA received as tonnage assessments. (J.A. 991; J.A. 1101). Since this fixed sum is guaranteed regardless of the amount of tonnage loaded or unloaded from the ships chartered by PM&O (J.A. 991-92), these tonnage assessments did not and could not have contractually triggered or defined the amount contributed by NYSA to the Pension Fund.

8. *PM&O Stopped Sending The Ships It Chartered To The New York Ports*

After September, 1985, PM&O had no cargo to send to the East Coast. Its cargo was sent to California ports only. (J.A. 1187).

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[9] The General Cargo Agreement did not even obligate PM&O to pay tonnage assessments to NYSA. Instead, the Agreement explicitly provides that:

> [T]onnage assessment shall *be collected by the direct employer* [Maher] from each of the carriers *and shall be paid to NYSA for immediate transmittal to the NYSA-ILA Fringe Benefits Escrow Fund* . . . . (J.A. 1140-41).

In fact, NYSA is not required to transmit tonnage assessments to any fringe benefit fund. O'Neill (NYSA's Executive Vice President) admitted that NYSA takes a portion of the money to pay its own expenses. (J.A. 1013). Thus, the General Cargo Agreement placed the responsibility for payment of tonnage assessments directly on stevedore companies, like Maher Terminals, who were the "direct employers" of the longshoremen, or NYSA. (J.A. 1140-41).

Since PM&O did not employ any longshoremen (J.A. 1184), it did not fire a single longshoreman as a result of this decision.

In fact, not a single hour of work attributable to longshore employees who were employed by Maher Terminals (the only New York stevedore company PM&O used) was lost. Instead, the hours of work attributed to longshore employees employed by Maher terminals substantially increased in the years which PM&O sent cargo only to West Coast ports. (J.A. 1234). Nor do defendants claim that pension payments decreased.

9. *The NLRB Finds That PM&O Was Not An Employer Of Longshoremen In The Port Of New York*

In October, 1986, the ILA filed an unfair labor practice charge with the NLRB alleging that PM&O had violated the NLRA by failing to bargain with the ILA over the decision to cease calling at the Port of New York. (J.A. 1199). NYSA chose to participate in this proceeding in support of the ILA. (J.A. 1200). In response, PM&O pointed out that it had no duty to bargain with the ILA because PM&O was not and had never been an "employer" of longshoremen. (J.A. 1201-11; J.A. 1213-16).

The NLRB agreed with PM&O. In a written decision issued by the Regional Director in March, 1986, the NLRB specifically held that PM&O was neither an employer nor a joint-employer of longshoremen in the Port of New York. (A-18-20).

The ILA's unfair labor practice charge was, accordingly, dismissed in its entirety and neither the ILA nor NYSA pursued any appeal of this decision. (J.A. 1218).

## REASONS FOR GRANTING THE WRIT

### 1. The Petition Should Be Granted Because The Lower Court's Decision Conflicts With This Court's Recent Teachings On Statutory Construction And Wreaks Havoc On Congress' Carefully Drawn Statutory Scheme

The simple issue here is whether petitioner is an "employer" within the meaning of Section 4201(a) of ERISA, 29 U.S.C. § 1381(a). Just last year, this Court in *Community for Creative*

*Non-Violence* v. *Reid*, ____ U.S. ____, 109 S. Ct. 2166 (1989), reiterated its settled teaching as follows:

> "Where Congress uses terms that have *accumulated settled meaning under . . . the common law*, a court *must infer*, unless the statute otherwise dictates, that *Congress means to incorporate the established meanings* of these terms."

109 S. Ct. at 2172 (quoting *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981) (emphasis added)).

The Court in *Reid* went on to apply this rule, as it has in the past, to interchangeable terms for the employment relationship — "terms such as 'employee,' '*employer*,' and 'scope of employment." 109 S. Ct. 2172-73 (emphasis added). It concluded that there was "[n]othing in the text" of the statutory provision or in the "structure or context of the statute" to indicate a "broader definition" than the "general common law of agency." *Id.*

The court below, however, failed to apply the settled and established meaning of the term "employer" on the ground "that the common law definition does not control." (A-5). The lower court based this conclusion on prior Second Circuit decisions, notably *Korea Shipping* v. *NYSA - ILA Pension Trust Fund*, 880 F.2d at 1539, which imposed a broader, "contributing obligor" definition of "employer." The *Korea Shipping* court did not explain how the statute "otherwise dictate[d]" this result, but rather opined that its departure from the statutory language was more "consistent" with "the purposes that animated the lawmakers in enacting [the MPPAA]." *Id.* at 1537.

By its decision, the lower court strayed from the statutory construction principles laid down by this Court. This Court has recently and repeatedly emphasized that the true legislative purpose of any federal enactment is evidenced by the words Congress uses and by the statutory structure. These, the lower court ignored. (*See* pages 12-13, *infra.*)

Far from effectuating the congressional purpose, the lower court improperly legislated on Congress' behalf. The true effect of the lower court's decision is to impose withdrawal liability not on the employer — as Congress expressly intended — but on its customer (like the petitioner here), which had no employment

relationship with those workers covered by the applicable pension plan. This not only expands the statute beyond its intended scope but puts it at war with other basic principles of federal labor law. (*See* pages 18-22 *infra*).

If the lower court's statutory construction is allowed to stand, clever unions and employers will be able to use the "club" of withdrawal liability to penalize those commercial customers who may subsequently deign to obtain the same products and services from non-unionized competitors or those organized by other unions. There is not the slightest suggestion that Congress intended the MPPAA to be used as a sword by conniving unions and unionized employers effectively to coerce the maintenance of their existing market share. Yet, that is the unwitting consequence of the Second Circuit's rule and a perfect example of the havoc wrought when courts try to "improve" on what Congress wrote.

### A. The Decision Below Departs From The Established Meaning Of The Statutory Term "Employer," Which Is The Clearest Indication Of Congressional Intent

The guiding principle to be used by lower courts for interpreting federal statutes is settled: "Absent a *clearly expressed* legislative intent to the contrary, [the statutory] language must ordinarily be regarded *as conclusive*." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (emphasis added).[10] Courts are not permitted, as did the court below, to depart from the statutory language in favor of a perceived legislative purpose. Rather, they are "bound to 'assume' that the legislative purpose is expressed by the ordinary meaning of the words used." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431-32 (1987) (citations omitted). Furthermore, when "'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[*there is no occasion] to examine the additional considerations of 'policy'* . . . that may have influenced the lawmakers in their formulation of the statute."'" *Rodriguez v. United States*, 480 U.S. 522, 526 (1989) (emphasis added) (citations omitted).

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[10] *Accord United States* v. *James*, 478 U.S. 597, 606 (1986) (citations omitted) ("'when . . . the terms of a statute [are] unambiguous, judicial inquiry is complete, except "in 'rare and exceptional circumstances'"'").

Here, as the lower court conceded, the legislative history (not the common law meaning of the word employer) is, at best, "ambiguous and somewhat contradictory." *Korea Shipping*, 880 F.2d at 1536. It by no means mandated the lower court's misconstruction. The operative term – "employer" – has accumulated "settled" and "established" meanings under common law. Consequently, the court simply had no occasion to contrive a meaning "derived from assessing the purposes of the legislation." *Id.* at 1535. Put bluntly, the lower court had no authority to plug "a gaping hole," *id.* at 1537, it *thought* existed in the statute as written. *Cf. Laborers Health and Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 550-51 (1988) (rejecting "policy argument" that broad construction of ERISA § 515 was needed to fill "'gap' in the enforcement scheme").[11] By so doing, the court of appeals transgressed the boundaries established by this Court for confining the federal judiciary to its proper role of interpreting – but not purporting to "improve" – statutes as enacted by Congress. If Congress created the "gap," it is Congress alone which can close it.

The error of the court below was exactly what this Court took pains to avoid in *Community For Creative Non-Violence* v. *Reid*, *supra*. Here, as in *Reid*, the court of appeals was called upon to interpret one of the accepted cognate terms for the employment relationship. Here, as in *Reid*, the term was central to the operation of a federal statute of wide ranging applicability. And, here, as in *Reid*, a Supreme Court decision and strict adherence to the settled meaning of "employer" is required to "ensur[e] predictability and advance planning," 109 S. Ct. at 2178, by all affected parties as to their relative obligations, if any, with respect to multiemployer pension plans.

### B. The Court Below Ignores The Statutory Structure Which Mandates The Common-Law Meaning Of the Term "Employer"

While the Second Circuit, of course, acknowledged this Court's admonition that the definitions of Title I of ERISA "'do not apply

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[11] In *Advanced Lightweight*, this Court held that ERISA § 515, 29 U.S.C. § 1145, authorized actions by benefit fund trustees for delinquent contributions due during the term of a collective bargaining agreement but not after its expiration, even though a *statutory* obligation to make post-expiration contributions may exist under § 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5).

elsewhere in the Act of their own force . . . .'" *Korea Shipping*, 880 F.2d at 1536 (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 370 n.14 (1980)), it apparently choose to rely on the second half of the quoted sentence of *Nachman*, which implies that "definitions in Title I 'may otherwise reflect the meaning of the terms as used in other Titles,'" *id.* (quoting *Nachman Corp.*, 446 U.S. at 370 n.14). Steeled by this footnote snippet from *Nachman*, the *Korea Shipping* court went on to apply the Title I definition of "employer" to Section 4201, which is part of Title IV.[12]

This again conflicts with the teaching of *Reid*, which mandates "[s]trict adherence to the language and structure" of a federal statute, especially one which is the product of "a series of carefully crafted compromises." 109 S. Ct. at 2177 n.14. Repeatedly in recent years, this Court has emphasized that when Congress uses particular language in one portion of a statute but not in another portion, courts should "'presume[] that Congress acts intentionally and purposely in the disparate inclusion or exclusion[,]'" and must not "ascribe [such] difference to a simple mistake of draftsmanship." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citations omitted).[13]

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[12] While the *Korea Shipping* court did not expressly state that it was applying the Title I definition of "employer," its language closely parallels the Title I definition. In addition, the *Korea Shipping* language is adopted from the decision of the district court in that case, which expressly rejected the "common law or dictionary definition" in favor of what that court characterized as "the more practical meaning applied to the term 'employer' in Title I of ERISA." *Korea Shipping*, 663 F. Supp. 766, 769 (S.D.N.Y. 1987), *aff'd.*, 880 F.2d 1531 (2d Cir. 1989). Other courts have concluded that *Korea Shipping* "*held* that the Title I definition of 'employer' should apply to the MPPAA." *Carrier Container Council* v. *Mobile S.S. Assoc.* 896 F.2d 1330, 1343 (11th Cir. 1990) (emphasis added) (holding that the *Korea Shipping* "contributing obligor definition drawn from Title I applies to the term 'employer' in section 1381(a)"). Any semantic distinction between applying the Title I definition or applying a definition "drawn from" Title I is one without a difference.

[13] *Accord General Motors Corp.* v. *United States*, __ U.S. __, 110 S. Ct. 2528, 2532 (1990) (Congress "acted intentionally" in omitting 4-month deadline in one section of the Clean Air Act when "Congress expressly included other deadline in the [same] statute"); *Omni Capital International* v. *Rudolf Wolff*, 484 U.S. 97, 106 (1987) (court will not imply provision for nationwide service of process where Congress amended statute to authorize nationwide service

*(Footnote continued)*

If the *Korea Shipping* court had complied with this Court's directive and considered the statutory structure of the MPPAA, it would have readily seen that its facile imputation of the Title I definition of "employer" could not be sustained. That would itself have obviated any need to address legislative purpose. *See INS* v. *Cardoza-Fonseca*, 480 U.S. at 452-453 (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.")

The *Korea Shipping* court apparently failed to notice that Title IV of ERISA – which contains the withdrawal liability section at issue here – provides its own definitions.[14] Among those, is the definition of "person," which expressly incorporates by reference the Title I definition of that same term. *See* ERISA § 4001(a)(20), 29 U.S.C. § 1301(a)(20). Clearly, if Congress truly wanted to impose withdrawal liability on any entity encompassed by the Title I definition of "employer," it knew how to effectuate that intent. Its failure to do so should not be "ascribed . . . to a simple mistake in draftsmanship." *Russello*, 464 U.S. at 23.

Nor was Congress merely inadvertent in establishing a two-part standard for "withdrawal" under section 4203(a), 29 U.S.C. § 1383(a): namely, *first*, that there is an "employer" which, *second*, permanently (i) ceases "to have an obligation to contribute" or (ii) ceases "all covered operations." To define "employer" merely by reference to an "obligation to contribute," effectively reads the term "employer" out of the statutory text.

The lower court also overlooked that, while Title IV does not define "employer," it does adopt a rule of construction whereby all "trades and business . . . which are under common control" are deemed to be "a single employer" for purposes of Title IV. ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1). Under this provision,

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for certain sections but not for the section at issue); *INS* v. *Cardoza-Fonseca*, 480 U.S. at 431, (different statutory language mandates different standards for asylum than for suspension of deportation proceedings); *id.* at 443 (use of same standard would "ignore[] the structure of the Act.")

[14] When transferred to the United States Code, Title IV of ERISA is redesignated Subchapter III of Chapter 18. This is because ERISA Title III amends the Internal Revenue Code and hence is not included in the "Labor" title of the United States Code.

sister subsidiaries of the same parent are jointly and severally liable for, among other things, withdrawal liability. *See, e.g., Teamsters Pension Trust Fund* v. *H.F. Johnson, Inc.*, 830 F.2d 1009, 1012-13 (9th Cir. 1987). This provision was "purposely left unchanged" by the MPPAA, *id.* at 1013, and is in some ways broader than the Title I definition of "employer" and the NLRA "single employer" doctrine.[15] Congress might well have concluded that the Title I definition of "employer" would be excessive "overkill," given the broad reach of the "common-control" test for "single employer" status expressly provided in Title IV.

Finally, the *Korea Shipping* court also failed to consider that the MPPAA modified both Title I and IV of ERISA in ways directly relevant here. Specifically, MPPAA § 306, 94 Stat. at 1295, does two things: (1) adds a new section 515 to ERISA, 29 U.S.C. § 1145, which imposes a statutory duty on every "employer" to fulfill its contractual obligations to make contributions to multiemployer benefit plans and (2) modifies ERISA § 502, 29 U.S.C. § 1332, to provide a cause of action for recovery of delinquent contributions. By this placement of different MPPAA sections in different titles of ERISA, Congress evinced a clear intention that the Title I definition of the term "employer" be applied with respect to plan contributions under section 515, but not for withdrawal liability under section 4203. *Cf. Advanced Lightweight*, 484 U.S. at 545-46 (fact that Congress defined withdrawal liability by reference to both contractual and statutory obligations but referred only to contractual obligations in § 515 "is significant" in construing latter provision).

One practical consequence of this clearly intentional distinction is borne out by numerous lower court cases concerning whether shareholders and officers are personally liable for unpaid corporate obligations to multiemployer benefit plans. Courts have applied the Title I definition of "employer" to ERISA § 515, even though they may reach opposite results on the issue of personal

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[15] The Title I definitions require that there be action "on behalf of the [primary] employer in connection with the benefit fund." The NLRA "single employer" doctrine generally turns on whether there is common control of labor management relations. *Radio and Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965). Neither factor is relevant, however, under ERISA § 4001(b)(1).

liability, specifically with respect to whether shareholders and officers are "employers" as defined by Title I.[16] In contrast, the courts have uniformly rebuffed efforts to utilize the Title I definition of "employer" with respect to personal liability for withdrawal liability under ERISA § 4203 and have *not* subjected shareholders and officers to personal liability under section 4203, except when "piercing the corporate veil" would otherwise be permitted under common law.[17]

Indeed, in *Connors* v. *P&M Coal Co.*, 801 F.2d 1373 (D.C. Cir. 1986), the leading case for rejecting personal liability for withdrawal liability, a court of appeals panel (including then-Judge Scalia) clearly articulated the proper standard, which the court below here regrettably failed to apply:

> [W]e need not decide the scope to be given the word "employer" in Title I of ERISA, as we are dealing with a separate subchapter of that statute. Nor need we consider the question of the general applicability of Title I definitions to Title IV. *It suffices that we can find nothing within the language or structure of MPPAA that requires us to accept the Trustees' interpretation.*

*Id.* at 1377 (emphasis added).

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[16] *See, e.g., Plumbers' Pension Fund, Local 130* v. *Niedrich*, 891 F.2d 1297 (7th Cir. 1989) (no personal liability), *cert. denied*, ___ U.S. ___, 110 S. Ct. 2169 (1990); *Rockney* v. *Blohorn*, 877 F.2d 637 (8th Cir. 1989) (no personal liability); *Leddy* v. *Standard Dry Wall*, 875 F.2d 383 (2d Cir. 1989) (personal liability); *Scarborough* v. *Perez*, 870 F.2d 1079 (6th Cir. 1989) (no personal liability); *International Brotherhood of Painters & Allied Trades Union* v. *George A. Kracher, Inc.*, 856 F.2d 1546 (D.C. Cir. 1988) (no personal liability); *Massachusetts Laborers' Health & Welfare Fund* v. *Starrett Paving Corp.*, 845 F.2d 23 (1st Cir. 1988) (no personal liability), *cert. denied*, ___ U.S. ___, 110 S. Ct. 2169 (1990); *Solomon* v. *Klein*, 770 F.2d 352 (3d Cir. 1985) (no personal liability); *Operating Engineers Pension Fund* v. *Reed*, 726 F.2d 513 (9th Cir. 1984) (no personal liability); *Donovan* v. *Agnew*, 712 F.2d 1509 (1st Cir. 1983) (personal liability).

[17] *See, e.g., Scarbrough* v. *Perez*, 870 F.2d 1079, 1084-85 (6th Cir. 1989); *De Brecini* v. *Graf Bros. Leasing, Inc.*, 828 F.2d 877, 879-80 (1st Cir. 1987), *cert. denied sub. nom., New England Teamsters & Trucking Industry Pension Fund* v. *Graf*, 484 U.S. 1064 (1988); *Connors* v. *P&M Coal Co.*, 801 F.2d 1373, 1376-78 (D.C. Cir. 1986); *Solomon* v. *Klein*, 770 F.2d 352, 354 (3d Cir. 1985); *Glover* v. *S.D.R. Cartage Co., Inc.*, 681 F. Supp. 1293, 1295-97 (N.D. Ill. 1988); *Combs* v. *Sun-Up Coal Co., Inc.*, 634 F. Supp. 13, 15-19 (D.D.C. 1985).

There are, of course, obvious reasons why Congress might want to apply different standards for delinquent benefit fund contributions (which are akin to unpaid wages and Social Security withholding) than for withdrawal liability (which has no real analogue under other federal labor laws). *Cf. Advanced Lightweight*, 484 U.S. at 545-47 (discussing difference between withdrawal liability and delinquent contributions); *INS* v. *Cardoza-Fonseca*, 480 U.S. at 440-42 (use of different standards for refugee status under different sections of immigration law). This also underscores that Congress' use of the word "employer" in ERISA § 4203 was a conscious policy choice concerning the reach of withdrawal liability and not an "error" in drafting which the courts may "correct."

### C. The Lower Court Misconstrued Legislative Intent And Unwittingly Brought ERISA § 4203 Into Conflict With Other Principles Of Federal Labor Law

Not only did the *Korea Shipping* court fail to constrain itself to the language and structure of the MPPAA, but it also failed to address whether its proffered construction of Section 4203(a) was "compatible with the surrounding body of law into which the provision must be integrated." *Green* v. *Block Laundry Machine Co.*, ____ U.S. ____, 109 S. Ct. 1981, 1994 (1989) (Scalia J., concurring). Consequently, it produced a result clearly at odds with the overall Congressional scheme for regulating labor-management relations in the United States.

Multiemployer pension plans are, by definition, creatures of collective bargaining. *See* ERISA § 4001(a)(3)(B), 29 U.S.C. § 1301(a)(3)(B). Even the phrase "obligation to contribute" contained in § 4203 – on which the lower court relied – is itself a term of art under ERISA and expressly defined by reference to collective bargaining agreements and "dut[ies] under applicable labor-manangement relations law." *See* ERISA § 4212(a), 29 U.S.C. § 1392(a).

Congress was thus acutely aware that by regulating multiemployer pension plans, it was intruding into the domain of collective bargaining, and Congress intended to "fix" what it found to be "broke" in a way that, so far as possible, did least damage to the "surrounding body" of federal labor law into which

the withdrawal liability provisions of MPPAA "must be integrated." *See* H.R. Rep. No. 96-869, 96th Cong., 2d Sess. 63, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2931 ("Multiemployer plans are creatures of collective bargaining. The committee believes that the integrity of the collective bargaining process must be preserved to the utmost extent consistent with assuring the financial soundness of multiemployer plans to meet benefit commitments.")

Consequently, there is nothing in the "purposes that animated the lawmakers," *Korea Shipping*, 880 F.2d at 1537, to suggest that Congress intended withdrawal liability to attach to the *customers* of employers that had, through collective bargaining, agreed to subscribe to underfunded multiemployer pension plans. Yet, that is exactly what the lower court did here.

There is no dispute that petitioner was not, under the traditional common-law definition, an employer of the employees who participated in the NYSA-ILA Pension Fund. Nor was petitioner a "joint," "alter ego," "allied" or "successor" employer, as those terms have come to be used under federal common law of the employment relation.[18]

Indeed, petitioner was not even a member of the industry association (NYSA) which had negotiated a multiemployer collective bargaining agreement with the ILA. Hence, it had no statutory obligation to contribute to the multiemployer plan under the law of multiemployer bargaining as developed under federal labor management relations law.[19] Rather, petitioner was a customer of a stevedoring company that paid, as part of its contract price, a fee called a "tonnage assessment" to the NYSA, which, in turn, paid some portion of the aggregate assessments received to the Pension Fund, pursuant to NYSA's agreement with the ILA.

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[18] *See, e.g., Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481-82 (1964) (joint employer); *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100, 105-07 (1942) (alter ego); *Fugazy Continental Corp.* v. *NLRB*, 725 F.2d 1416, 1419 (2d Cir. 1984) (alter ego); *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 627 (1967) (allied); *General Teamsters Local 959* v. *NLRB*, 743 F.2d 734, 736 (9th Cir. 1984) (allied); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (successor).

[19] *See generally Bonanno Linen Service, Inc.* v. *NLRB*, 454 U.S. 404 (1982).

For some reason, at which petitioner can only guess, the ILA and the stevedoring companies who actually employ longshoremen concocted a scheme whereby shippers who engage the stevedores are required to pay the tonnage assessment as part of their cost of having their cargo unloaded by ILA member longshoremen. Part of the assessment is used to defray NYSA's own obligations to the longshoremen's Pension Fund, even though the shippers (like petitioner here) may employ *not a single longshoreman eligible to participate* in that multiemployer plan. There is nothing in the language or structure of the MPPAA or in the policy objectives articulated by Congress that suggests an intention to use the MPPAA to support or enforce such schemes of indirect, unwitting and often, as here, coerced subsidies by customers of the actual employers.

Worse still, by defining "employer" by reference to an "obligation to contribute" (which, as noted, collapses a distinction explicit in the statutory text) and then applying that latter phrase without reference to whether the petitioner employed any industry employees, the court below brought section 4203 of ERISA into direct (but unnecessary) conflict with section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186. Under section 302, payments to union or a union-affiliated benefit fund (like the Pension Fund) are unlawful unless one of the section 302(c) exceptions applies. Applicable here is subdivision 5 of 302(c) which permits payments:

> to a trust fund established . . . for the sole and exclusive benefit of the *employees of such employer*, . . . (or of such employees . . . *jointly* with the employees of *other employers making similar payments* . . . )[.]

29 U.S.C. § 186(c)(5).

In *Walsh* v. *Schlecht*, 429 U.S. 401 (1977), this Court made clear that, while section 302 permits contributions "measured by" the work of another company's employees, such practice is lawful *only if* the contributing employer makes such payments solely "on behalf of" its own employees. 429 U.S. at 409.[20]

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[20] *Accord Todd* v. *Benal Concrete Const. Co., Inc.*, 710 F.2d 581, 583 (9th Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984) (§ 302 "only permits contributions 'on behalf of' or 'for the benefit of' a contractor's *own* employees.")

Nonetheless, the court below held that petitioner here had an "obligation to contribute" and, therefore, to make withdrawal liability payments to the NYSA-ILA Pension Fund even though such payments would not, and could not, benefit any of petitioner's employees. It is hard to fathom how this could possibly be reconciled with the mandates of LMRA § 302. Nor would there be any need to try if only the court below had construed the statute as Congress wrote it and limited withdrawal liability to "employers" of the employees eligible to participate in the multiemployer pension plan.[21] *See also* pages 24-26, *infra* (discussing circuit court conflict on this issue).

Of even more concern than this apparent statutory conflict, is the potential for abuse created by the *Korea Shipping* "contributing obligor" approach. Using this standard, a union with a sufficiently intimidating strike threat can use that power to impose on unwitting customers an "obligation to contribute" to the multiemployer pension plan on behalf of *another* company's employees merely by (1) requiring the customer to "subscribe" to the collective bargaining agreement (even though it is in no sense the employer of the plan participants) and (2) earmarking a portion of the customer's fee for services to cover "shortfalls" in plan contributions. (That, of course, is what happened to petitioner here). In that event, the customer would, under the *Korea Shipping* standard, be required to pay the penalty of withdrawal liability as the "price" for its economically motivated decision to take its business someplace else. The antitrust implications of this scheme are clear.

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[21] The *Korea Shipping* court attempted to harmonize this apparent conflict by observing that *Korea* plaintiffs were members of NYSA. 880 F.2d at 1539. Petitioner here, however, was not a member of NYSA and, in any event, the *Korea Shipping* court ignored the critical point, which is whether the association member actually employed the employees who participated in the fund. Furthermore, to the extent the *Korea Shipping* court purported to evade the plain meaning of the statute by reference to the "policies and purposes of [LMRA § 302]," *id.* at 1538, it made the same mistake as it did in interpreting ERISA § 4203. Finally, the *Korea Shipping* court erred in purporting to distinguish *Walsh* v. *Schlecht* on the grounds that shippers "benefited from using the labor of the funds beneficiaries who were employed by stevedoring companies," *id.*, because the *Walsh* standard is whether the payor's employees benefited from the benefit plan, not whether the payor benefited from the work performed by the actual employer's employees. Clearly, LMRA § 302 would be stretched beyond recognition if it permitted payments by any company "benefited" from the labor of some other company's employees.

Clearly, in enacting the MPPAA, Congress was concerned about underfunded pensions in declining industries. That, however, does not mean it intended to make customers in those industries captive to their existing unionized suppliers or permit withdrawal liability to be used as a weapon to preserve existing market share.

Congress is in a better position than the courts to appreciate the full practical significance of its enactments. The surest way to effectuate congressional purpose and preserve the balance of competing economic interests that are necessarily implicated by legislation impacting on labor-management relations, like the MPPAA, is simply to listen to the words Congress chose to express its intent.

### D. The Ramifications Of The Lower Court's Erroneous Statutory Construction Extend Far Beyond The Facts of This Case

The significance of the lower court's failure to effectuate the true intent of Congress – and the resultant adverse impact on labor-management relations – extends far beyond the facts of this case.

There are, by now, several reported cases showing that ILA pension plans in various ports are actively pursuing non-employers for withdrawal liability under a "contributing obligor" rationale.[22] There are surely numerous other pending cases in precisely this vein, and many more cases where payments are being made without suit.

The same issue has arisen in a variety of other contexts. There is, for example, the question of whether a company that retains another to supply trucking services is an "employer" obligated to pay withdrawal liability when it terminates that service

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[22] *See Bowers* v. *Transportacion Maritima Mexicana*, 901 F.2d 258 (2d Cir. 1990) (steamship carrier) (Port of New York); *Carriers Container Council* v. *Mobile S.S. Assoc.*, 896 F.2d 1330 (11th Cir. 1990) (carrier association) (Port of Mobile); *In re Seatrain Lines, Inc.*, 46 Bankr. 320 (S.D.N.Y. 1985) (carrier) (Port of New York); *In re Uiterwyk Corp.*, 63 Bankr. 264 (M.D. Fla. 1986) (international carrier) (Port of New York); *Bowers* v. *Egyptian National Line*, 721 F. Supp. 490 (S.D.N.Y. 1990) (international carrier) (Port of New York); *Bowers* v. *Transporters Navieros Ecuodoranos (Transnave)*, 88 Civ. 5481 (S.D.N.Y. July 28, 1989) (international carrier) (Port of New York).

contract.[23] Similarly, it can happen in the coal industry that one coal mining company, which owns the mine, hires another to mine that coal, and the question then becomes which company is the "employer" for the purposes of withdrawal liability when the mine is shut down.[24]

There are a whole range of industries in which one company customarily retains another to provide some service.[25] Under the *Korea Shipping* "contributing obligor" standard, a company could be regarded as an "employer" subject to withdrawal liability when the contractual relationship has ended, even though there would be (as here) no liability whatsoever under the NLRA.[26] Furthermore, if the rationale of the *Korea Shipping* court were accepted and withdrawal liability imposed whenever necessary to fill "a gaping hole" of underfunded multiemployer pension plans, there is virtually no end to the circumstances in which withdrawal liability could be vicariously imposed.[27]

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[23] *See Refined Sugars* v. *Local 807 Pension Fund*, 632 F. Supp. 630, 635 (S.D.N.Y. 1986) (customer *not* liable for withdrawal liability because Title I definition inapplicable and customer not common-law or joint employer of drivers); *Central Pennsylvania Teamsters Pension Fund* v. *Service Group, Inc.*, 465 F. Supp. 996 (E.D. Pa. 1985) (customer liable on ground it "retained the day-to-day control" of drivers supplied by service company); *American Stevedoring Corp.* v. *Burlington Industries*, No. 85 C 4180 (N.D. Ill. Dec. 19, 1985) (applying Title I definition of "employer" to hold customer obligated for service company's withdrawal liability).

[24] *See Superior Pocahontas Coal Co.* v. *Island Creek Coal Co.*, 840 F.2d 11 (unpublished opinion), 9 Empl. Ben. Cas. (BNA) 1302 (4th Cir. 1988) (finding mine owner *not* obligated for withdrawal liability because it did not employ mine workers at particular site in question). The *Superior Pocahontas* case and its relevance for the instant certiorari petition is more fully discussed at pages 25-26, *infra*.

[25] *See, e.g., Clinton's Ditch Coop* v. *NLRB*, 778 F.2d 132 (2d Cir. 1985) (trucking), *cert. denied*, 479 U.S. 814 (1986); *TLI, Inc.*, 271 N.L.R.B. 798 (1984) (trucking), *enforced w/o opinion*, 772 F.2d 894 (3d Cir. 1985); *Union Carbide Building Co.*, 269 N.L.R.B. 144 (1984) (custodial services); *U.S. Contractors*, 257 N.L.R.B. 1180 (1981) (custodial services), *enforcement denied on other grounds*, 697 F.2d 692 (5th Cir. 1983); *International House* v. *NLRB*, 676 F.2d 906 (2d Cir. 1982) (food services).

[26] *See Union Carbide Building Co.*, 269 N.L.R.B. 144, 148 (1984), (no NLRA liability where building's managing agent terminates contract with unionized building maintenance company when two companies are not "joint" employers).

[27] *See, e.g., Giardiello* v. *Balboa Insurance Co.*, 837 F.2d 1566, 1569 (11th Cir. 1988) (considering whether surety for construction contractor is liable for

*(Footnote continued)*

An erroneous court of appeals decision with such wide-ranging significance and potentially mischievous consequences clearly warrants Supreme Court review.

2. **The Petition Should Be Granted Because The Lower Court's Decision Conflicts With The Decisions Of Other Courts Of Appeals**

By drawing its definition of "employer" under ERISA § 4203 from the expansive Title I definition, the Second Circuit's *Korea Shipping* decision (and its progeny) conflicts with all the other courts of appeals that have rejected this approach in refusing to automatically extend withdrawal liability to corporate shareholders and officers (see page 17n. 17, *supra*). Significantly, these other courts were more constrained in their interpretation, even though imposing withdrawal liability personally on corporate shareholders and officers would obviously serve the same policy objective identified by *Korea Shipping*: namely, improving the "financial viability" of underfunded multiemployer pension plans. 880 F.2d at 1537. Congress, as should now be clear, was not nearly so single-minded in its approach.

These other courts are also more circumspect than *Korea Shipping* with respect to the concept of "contributing obligor." For example, in *Massachusetts Laborers' Health and Welfare Fund* v. *Starret Paving Corp.*, 845 F.2d 23 (1st Cir. 1988), *cert denied*, ____ U.S. ____, 110 S. Ct. 2169 (1990), the First Circuit assumed without deciding that the president and sole shareholder of a corporation was an "employer" under the Title I definition for purposes under ERISA § 515. Nonetheless, it refused to find personal liability on the grounds that the individual was not "obligated to make contributions to a multiemployer plan" as required by that provision of the MPPAA because the relevant contract simply did not so provide. *Id.* at 25 (contrary interpretation would "depart from the express words of the statute.") This holding and analysis clearly conflicts with the lower court's decision here. The latter was predicated on the court's factual gloss

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subcontractors withdrawal liability); *Zarro's* v. *U.S. Fidelity and Guarantee Co.*, 820 F.2d 1176, 1180 (11th Cir. 1987) (same); *Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489, 526 (5th Cir. 1982) (concluding that successor employer liable for predecessors delinquent benefit fund contributions only if "alter ego" status established).

that petitioner's payments were "contributions," even though the record clearly established that petitioner's only *contractual* obligation was to make tonnage assessments and similar payments to NYSA, not the Pension Fund.

In addition, the *Korea Shipping* decision – especially as applied in this case – would extend withdrawal liability to companies other than the actual employer of the employees who participate in the plan merely because they were also signatories to the same, underlying collective bargaining agreement. In that regard, *Korea Shipping* directly conflicts with the Fourth Circuit's unpublished decision in *Superior Pocahontas Coal Co.* v. *Island Creek Coal Co.*, 840 F.2d 11 (unpublished opinion), 9 Empl. Ben. Cas. (BNA) 1302 (4th Cir. 1988), which held just the opposite.

In *Superior Pocahontas*, the direct employer was a mine operator who agreed to mine coal at a site owned by another company and its successor (collectively, the "mine owners"). Both the mine owners and operator were party to the master collective bargaining agreement with the United Mine Workers of America ("UMW"). The mine owners paid the operator/employer a set price for each ton of coal delivered and would "make all payments required" to the applicable multiemployer plan while the operator mined coal at the site. 9 Empl. Ben. Cas. (BNA) at 1304.

Subsequently, the mine owners exercised their contractual right to terminate the agreement and ceased making trust payments on behalf of the operator's employees. The operator was assessed withdrawal liability by the fund and brought an action against the owners for indemnification. The mine operator predicated its claim, in part, on the fact that the owners "were required under a collective bargaining agreement to make contributions to a multiemployer plan," had signed the UMW labor agreement as employers and "fit under a definition of employer . . . borrow[ed] from Title I of ERISA." *Id.* at 1305.

The Fourth Circuit rejected the operator's claim and its reasoning directly conflicts with the *Korea Shipping* approach. Specifically, the Fourth Circuit said as follows:

> While [the mine owners] employ[] mine workers at other sites, *they were not the employers of the employees in question*. Their signing of the [UMW collective bargaining agreement] as an employer of mine workers *does not give them*

*employer status with regard to [the operator's] employees.* Any obligation they might have had to contribute to the Trusts for the [operator's] employees at the Mingo County site arose out of their contract with [the operator] and not out of the [UMW collective bargaining agreement].

*Id.* at 1306.

Petitioner here is even less connected to the multiemployer plan than were the mine owners in *Superior Pocahontas*. Petitioner did *not* even make direct contributions to the multiemployer pension plan. Rather, it paid tonnage assessments to NYSA, which in turn remitted some portion thereof to the Pension Fund. Furthermore, petitioner did *not* employ any longshoremen anywhere in the United States; whereas the coal owners in *Superior Pocahontas* actually employed other mine workers at different sites.[28]

The Fourth Circuit in *Superior Pocahontas* correctly concluded that withdrawal liability applies only to the actual "employer" of the employees who are eligible to participate in the pension plan, but not a nonemployer party that happens to pay the employer's pension plan contributions. In contrast, under the *Korea Shipping* standard, any "contributing obligor" is subject to withdrawal liability even if it, like petitioner here, is not in any sense an employer of the employees in question.

Consequently, there is a direct and irreconcilable conflict between *Superior Pocahontas* and *Korea Shipping*. Since the issue of which entity is obligated to make withdrawal liability payments under ERISA § 4203 has such wide-ranging significance (*see* pages 22-23, *supra*), the Court cannot allow this conflict to persist.

**3. The Petition Should Be Granted To Halt Lower Court Erosion Of This Court's *Kaiser Steel* Decision Effectuating the Congressional Mandate That "Hot Cargo" Clauses Are Unenforceable and Void**

This case presents a much needed opportunity for this Court to re-invigorate its teaching in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), which held, in part, that multiemployer benefit

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[28] Below defendants argued that their scheme was merely a collection mechanism. The tonnage assessments, if they are a collection mechanism, are a collection mechanism for NYSA, not for the Pension Fund. In *Superior Pocahontas*, plaintiff paid directly to the Fund.

funds cannot be used to effectuate agreements violating section 8(e) of the NLRA, 29 U.S.C. § 158(e), because Congress has mandated that all such agreements "shall be to such extent unenforcible and void." 455 U.S. at 84. The courts below unduly limited the scope of *Kaiser* and, contrary to strong public policy, have permitted federal judicial power to be enlisted by the parties to a "hot cargo" agreement to enforce their illegal bargain against an innocent third-party. Regrettably, this crabbed and debilitating reading of *Kaiser* is not unique.[29]

In *Kaiser*, this Court held that an illegality defense based on NLRA § 8(e) may be raised against a multiemployer benefit fund if judicial enforcement of the payment sought would effectuate the very evil Congress so explicitly proscribed:

> [W]here an §8(e) defense is raised *by a party which §8(e) was designed to protect*, and where the defense is not directed to a collateral matter but to *the portion of the contract for which enforcement is sought*, a court must entertain the defense.

455 U.S. at 86 (emphasis added). In *Kaiser*, the Court specifically stated that the 8(e) defense related to the obligation to contribute to a pension fund and may be asserted against fund trustees. 455 U.S. at 83 n.8.

The section 8(e) proscription encompasses "any contract or agreement, express or implied, whereby [an] employer . . . agrees . . . to cease doing business with any other person." Here, the stevedoring company (Maher) entered into an agreement with a union (the ILA) that it (Maher) would not do business with certain other persons (*i.e.*, shippers, like petitioner) unless they "subscribed" to the NYSA-ILA collective bargaining agreement. Such agreement is a clear violation of section 8(e).[30] As such, it was "void at [its] inception." 455 U.S. at 84.

Absent Maher's illegal agreement not to deal with non-signatories, petitioner would not have "subscribe[d]" to the NYSA-ILA collective bargaining agreement. Nor would it have been bound to that agreement by operation of law, since petitioner

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[29] See note 32, *infra* (citing cases).

[30] *See, e.g., Milk Drivers and Dairy Employees Union, Local No. 471*, 209 N.L.R.B. 324 (1974); *Electrical Workers (IBEW) Local 437*, 180 N.L.R.B. 420 (1969).

(unlike some other shippers) was neither a member of NYSA nor of the applicable multiemployer bargaining unit. Yet, but for petitioner's status as a signatory/party to the labor agreement, it would not have been a "contributing obligor" subject to withdrawal liability. See A-5.

Consequently, the Pension Fund's assessment of withdrawal liability against petitioner here is clearly the "fruit of a poisonous tree" planted by the stevedores, NYSA and the ILA. By enforcing withdrawal liability against petitioner on the facts here alleged, the federal judiciary is giving its imprimatur to the very illegality Congress wanted to eliminate, denying safeguard to the party "§ 8(e) was designed to protect," 455 U.S. at 86, and aiding the miscreants to enjoy the benefit of their illegal bargain.[31]

It is also bitterly ironic that the lower court's own decision to extend ERISA § 4203 to non-employers creates a separate and distinct section 8(e) violation. Under the lower court's "contributing obligor" test, petitioner is deemed an "employer" that is required to pay withdrawal liability if and only if it "ceases to do business" with "any other person," namely, a stevedore who is a signatory to the ILA collective bargaining agreement in the New York port. Thus, by operation of Section 4203 (as construed by the courts below), petitioner's agreement to contribute to the Pension Fund (assuming, *arguendo*, there was such agreement) is transformed into a kind of "penalty" or "exit tax" petitioner must pay for electing to take its business to anyone other than a stevedoring company under contract with the New York branch of the ILA.

This result obtains, of course, *only because* the lower court extended the obligation for withdrawal liability to someone other than the actual employer. If petitioner and the stevedore (Maher) were "single" or "joint" employers, there would be no section 8(e) violation because there would not be "any *other* person" involved. Viewed otherwise, it is only by dint of the lower court's contorted definition of "employer" under ERISA § 4203 that the ILA, NYSA and the affiliated stevedores have an economic weapon, *they would not otherwise have had*, to punish independent carriers (like petitioner) who choose — for whatever reason — to

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[31] Denying withdrawal liability will not, however, harm the Pension Fund. It will only mean that the "shortfall" will be paid from NYSA's tonnage assessment fund, by the actual employers or by NYSA, rather than by petitioner.

cease doing business with the stevedores bound to the ILA labor agreement in the Port of in New York.

Apparently insensitive to the substantial section 8(e) issues raised in this case, the court below purported to distinguish *Kaiser*, stating (somewhat cryptically) that "PM&O has no valid claim that the promises to make payments, *per se*, violated §8(e) of the [NLRA]." A-5 (citing *Kaiser*, 455 U.S. at 83). This, however, ignores that petitioner asserted this illegality defense with respect to the imposition of withdrawal liability and that such liability was solely predicated on the fact that, in the lower court's own words:

> [Petitioner] signed a separate agreement in which it *subscribed* to the Collective Bargaining Agreement between the NYSA and the ILA, including the provisions therein contained relating to hourly and tonnage contributions.

A-5 (emphasis added).

Thus, withdrawal liability flows directly from two illegal agreements, namely: (1) the stevedore/ILA agreement not to do business with nonsignatories and (2) petitioner's resultant "subscription" to the ILA collective bargaining agreement, which imposed the obligation to make what the court below called "tonnage contributions [*sic*]," A-5, to NYSA so that NYSA's own contributions to the Pension Fund are, by legal fiction, thereby attributed to petitioner.

If, as petitioner contends, these agreements violate section 8(e), they were "void at their inception" and cannot serve as the legal basis for petitioner's purported "obligation to contribute"; yet, without that, there is no pension fund "withdrawal" even under the lower court's construction of Section 4203. This is not something merely "collateral" to the underlying illegality but rather at the heart of the illegal bargain.

The lower court's holding effectively disregards *Kaiser* under the guise that agreements "collateral" to a illegal "hot cargo" clause can nonetheless be enforced. This reluctance to give *Kaiser* its full force is shared by other courts that will, it seems, deny the defense no matter how blatant the illegality and even if the

defense would have been allowed in contexts unrelated to multiemployer benefit funds.[32]

Of course, this Court did not decide *Kaiser* to have its decision "limited to its facts" by subordinate federal courts. Consequently, this case represents a perfect opportunity for this Court to re-affirm and explain to lower courts the true meaning of *Kaiser* as it relates to "hot cargo" contracts, in all their seemingly infinite variety.

## CONCLUSION

For all the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

PETER M. PANKEN
PARKER CHAPIN FLATTAU & KLIMPL
*Attorneys for Petitioner*

*Of Counsel:*
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JOHN K. DIVINEY
STACEY B. BABSON

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[32] *See Robbins* v. *Lynch*, 836 F.2d 330, 333-34 (7th Cir. 1988) (only a claim that the payment itself violates § 8(e) may be a defense in ERISA collection action); *Southern Cal. Retail Clerks Union* v. *Bjorklund*, 728 F.2d 1262, 1265-66 (9th Cir. 1984) (§ 8(e) illegality defense is not assertible in ERISA § 515 delinquent contribution action, even though outside ERISA, such a defense can be maintained); *Chicago Dist. Council of Carpenters* v. *Dombrowski*, 545 F. Supp. 325 (N.D. Ill. 1982) (the defenses as to fraud and duress, not related to the illegality of the contributions itself is not valid against a trustee); *accord O'Hare* v. *General Marine Transport Corp.*, 740 F.2d 160, 169 (2d Cir. 1984) (neither invalid contract provision nor union unfair labor practice constitutes defense to a trustees' suit for unpaid contributions unless illegality relates to contribution provision).

# APPENDIX

**United States Court of Appeals**
**for the**
**Second Circuit**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of July one thousand nine hundred and ninety.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL
HON. JOHN M. WALKER, JR.
Circuit Judges,

PHILIPPINES, MICRONESIA & ORIENT NAVIGATION COMPANY,

*Plaintiff-Appellant,*

—v.—

NYSA-ILA PENSION TRUST FUND, THE BOARD OF TRUSTEES OF THE NYSA-ILA PENSION TRUST FUND, THE NEW YORK SHIPPING ASSOCIATION, THE NYSA-ILA FRINGE BENEFIT ESCROW FUND, THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL-CIO),

*Defendants-Appellees.*

90-7152

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said

District Court be and it hereby is affirmed in accordance with the opinion of this Court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH,
Clerk

/s/Edward J. Guardaro
By: EDWARD J. GUARDARO,
Deputy Clerk

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 1340 - August Term, 1989

(Argued May 23, 1990 Decided July 11, 1990)

Docket No. 90-7152

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PHILIPPINES, MICRONESIA & ORIENT NAVIGATION COMPANY,

*Plaintiff-Appellant,*

v.

NYSA-ILA PENSION TRUST FUND, THE BOARD OF TRUSTEES OF THE NYSA-ILA PENSION TRUST FUND, THE NEW YORK SHIPPING ASSOCIATION, THE NYSA-ILA FRINGE BENEFIT ESCROW FUND, THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL-CIO),

*Defendants-Appellees.*

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BEFORE: VAN GRAAFEILAND, MESKILL and WALKER, *Circuit Judges*:

Appeal from a summary judgment of the United States District Court for the Southern District of New York (Cannella, J.) dismissing declaratory judgment action and claim for refund of payments to union pension fund. Affirmed.

PETER M. PANKEN, New York, New York (John K. Diviney, Stacey B. Babson, Parker Chapin Flattau & Klimpl, New York, New York, of counsel), *for Plaintiff-Appellant.*

KEVIN MARRINAN, New York, New York (Thomas W. Gleason and Ernest L. Mathews, Jr., New York, New York, of counsel), *for Defendant-Appellee International Longshoremen's Association (AFL-CIO), and co-counsel to Defendants-Appellees NYSA-ILA Pension Trust Fund and its Board of Trustees, and NYSA-ILA Fringe Benefits Escrow Fund.*

C. Peter Lambos, Donato Caruso, (Nicholas G. Maglaras, William M. Spelman, Jr., Lambos & Giardino, New York, New York, of counsel), *for Defendant-Appellee New York Shipping Association, Inc., and co-counsel to Defendants-Appellees NYSA-ILA Pension Trust Fund and its Board of Trustees, and NYSA-ILA Fringe Benefits Escrow Fund.*

PER CURIAM:

Philippines, Micronesia & Orient Navigation Company ("PM&O"), a maritime carrier, appeals from a summary judgment of the United States District Court for the Southern District of New York (Cannella, J.) dismissing its action for a declaratory judgment and the refund of assessments paid to the NYSA-ILA Pension Trust Fund. PM&O sought a judicial declaration that it was not an "employer" of employee participants in the NYSA-ILA Pension Trust Fund and therefore was not liable under ERISA because of its withdrawal from the multiemployer trust plan. We affirm the district court's judgment.

From 1979 to 1985, PM&O, like most other carriers calling at the Port of New York, required the services of an independent stevedore company to unload its ships. As part of the cost of such services, PM&O paid tonnage assessments to the New York Shipping Association ("NYSA"), which in turn were paid to the NYSA-ILA Pension Trust Fund. When, in 1985, PM&O discontinued its operations at the Port of New York, the Fund sought to assess withdrawal liability in accordance with the provisions of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1381, *et seq.*

PM&O's principal argument against this imposition of withdrawal liability is that it was not the "employer" of the ILA longshoremen who unloaded its ships, as that term is used in 29 U.S.C. § 1381(a). In making this argument, PM&O relies upon the common law definition of "employer", which looks to such factors as control and supervision of the work, the payment of wages and the right to hire and fire. However, by now, it is well established that the common law definition does not control in cases such as this, where, although independent stevedore companies hire the longshoremen who perform the unloading, the carriers rather than the stevedore companies contribute to the Union's Pension Trust Fund. *See, e.g., Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258, 261-62 (2d Cir. 1990); *Korea Shipping Corp. v. NYSA-ILA Pension Trust Fund*, 880 F.2d 1531 (2d Cir. 1989); *Delta Steamship Lines, Inc. v. NYSA-ILA Pension Trust Fund*, 688 F. Supp. 1560 (S.D.N.Y. 1988), *aff'd*, 880 F.2d 1531 (2d Cir. 1989). The district court correctly concluded that PM&O was a section 1381(a) "employer."

Whether PM&O was a NYSA member is not of controlling significance on the issue of whether PM&O was a withdrawing employer under the statute. In PM&O's contract with its stevedore company, PM&O agreed to pay the tonnage and Joint Security Program assessments and container royalties called for in the Labor Agreement between the NYSA and the ILA. PM&O also signed a separate agreement in which it subscribed to the Collective Bargaining Agreement between the NYSA and the ILA, including the provisions therein contained relating to hourly and tonnage contributions. PM&O's obligations under these agreements were not made contingent on its membership in the NYSA.

Although PM&O had made the questioned payments for at least five years pursuant to the terms of the written agreements; it now seeks a refund pursuant to section 403 of ERISA, 29 U.S.C. § 1103. It has not shown, however, that these payments were made under a mistake of fact. Moreover, PM&O has no valid claim that the promises to make the payments, *per se*, violated section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e). *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982). It is not entitled to a refund. *See* section 403(c)(2)(A)(ii).

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| PHILLIPPINES, MICRONESIA & ORIENT NAVIGATION COMPANY, *Plaintiff,* — against — NYSA-ILA PENSION TRUST FUND, THE BOARD OF TRUSTEES OF THE NYSA-ILA PENSION TRUST FUND, THE NEW YORK SHIPPING ASSOCIATION, THE NYSA-ILA FRINGE BENEFIT ESCROW FUND, and THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (AFL-CIO), *Defendants.* | MEMORANDUM AND ORDER<br>86 Civ – 8647 (JMC) |

CANNELLA, D.J.:

Defendants' motion for summary judgment is granted. Fed. R. Civ. P. 56. Plaintiff's cross-moiton for summary judgment is denied. Fed. R. Civ. P. 56.

## BACKGROUND

Plaintiff Philippines, Micronesia & Orient Navigation Company ["PM&O"] seeks a declaratory judgment that it is not an employer subject to withdrawal liability under the Employee Retirement Security Act ["ERISA"], 29 U.S.C. § 1001 *et seq.* (1982 & Supp. V 1987), as amended by the Mulitemployer Pension Plan Amendments Act ["MPPAA" or the "Act"], 29 U.S.C. § 1381 *et seq.* (1982). In addition, PM&O seeks a refund from defendants for all assessments paid by PM&O during its tenure as a steampship carrier at the Port of New York. Defendants NYSA-ILA Pension Trust Fund and the Board of Trustees of the NYSA-ILA Pension Trust Fund [collectively the "Pension Fund"] counterclaim for the full amount of PM&O's withdrawal liability.[1] Both parties now cross-move for summary judgment.

Plaintiff PM&O is a California corporation with its principle place of business in San Francisco, California. From 1979 to 1985 PM&O engaged in steamship carrier operations at the Port of New York. PM&O transported cargo primarily for Castle & Cook, a major importer of pineapples from the Philippines. PM&O did not own or operate any of the ships it used to transport Castle & Cook's cargo. Instead, PM&O chartered ships from shipowners who provided both the ships and the crews to run them. In addition, PM&O did not operate its own marine terminal facility or employ its own labor force. To service the ships that it chartered, PM&O contracted with Maher Terminals ["Maher"], an independent stevedoring company. Maher in turn utilized longshoremen to unload PM&O's vessels. Maher's longshoremen employees worked under Maher's direction and were not hired or supervised by PM&O.

On May 1, 1979, PM&O and Maher entered into a stevedoring contract regarding services at the Port of New York. Maher informed PM&O that it was required to subscribe to the NYSA-ILA collective bargaining agreement. The collective bargaining agreement, which is the product of negotiations between the New York Shipping Association ["NYSA"], a multi-employer bargaining association, and the International Longshoremen's Association ["ILA"], is based on a two-tiered structure. First, there is a "master contract" which fixes uniform terms of employment for every ILA port on the Atlantic and Gulf coasts. Second, there is a local New York labor agreement known as the General Cargo Agreement ["GCA"], which covers local employment terms for the Port of New York. During its tenure at the Port of New York, PM&O was a direct signatory of both the master contract and the GCA. *See* Affidavit of John Bowers, ¶ 11, 86 Civ. 8647 (JMC) (S.D.N.Y. May 5, 1988) ["Bowers Affidavit"].

These collective bargaining agreements, in addition to setting forth the terms and conditions of employment, obligated the steamship carriers to contribute various assessments to be used for longshoremen benefit programs. Under the master contract, for example, the carriers commit themselves to pay Job Security Program assessments to offset shortfalls in contributions

to longshore pension, welfare and trust funds. In addition, the GCA requires carriers to pay assessments which provide funds for longshoremen fringe benefits and retirement programs. From 1974 to 1985, these assessments were based on the tonnage of cargo loaded or unloaded at the Port of New York. The specific procedures for collection and payment of tonnage assessments are set forth in the GCA:

> Such tonnage assessment shall be collected by the direct employer from each of the carriers and shall be paid to the NYSA for immediate transmittal to the NYSA-ILA Fringe Benefits Escrow Fund . . . as collected by said direct employer. Pension payment shall be made by the NYSA directly to the NYSA-ILA Pension Trust Fund. Amounts billed to carriers and not collected by the direct employers shall be reported to the NYSA-ILA Fringe Benefits Escrow fund promptly at the end of each billing period.

*General Cargo Agreement*, October 1, 1980 to September 30, 1983, at 118-19. Thus, while the portion of the assessments which went to the Pension Fund was paid directly by the NYSA, the NYSA received these funds from the carriers.

During its tenure in the Port of New York, PM&O complied with all of its assessment obligations. For the five year period prior to its withdrawal, PM&O paid $2,034,078 in assessments, of which $527,073.77 constituted contributions to the Pension Fund. *See* Affidavit of Richard H. O'Neill, ¶ 22, 86 Civ. 8647 (JMC) (S.D.N.Y. May 5, 1988). After PM&O discontinued operations at the Port of New York, the Pension Fund sought to assess withdrawal liability in accordance with the MPPAA. PM&O resisted, arguing that it was not an employer within the meaning of the Act.

## DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that a district court shall grant a motion for summary judgment if it determines that "there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law." The court is not to resolve disputed issues of fact, but must "assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986)(citing Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 247-52 (1986); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985)), *cert. denied*, 480 U.S. 932 (1987).

I. *Withdrawal Liability*

The MPPAA provides: "If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined . . . to be the withdrawal liability." 29 U.S.C. § 1381(a) (Supp. V 1987). "Complete withdrawal" is defined by the MPPAA as occurring, in pertinent part, when "[a]n employer . . . permanently ceases to have an obligation to contribute under the plan." 29 U.S.C. § 1383(a) (1982). PM&O argues that it is not subject to withdrawal liability because it was not an "employer" within the meaning of the MPPAA and it did not have an "obligation to contribute" to a multiemployer plan.

In Korea Shipping Co. v. New York Shipping Ass'n - Int'l Longshoremen's Ass'n Pension Trust Fund, 880 F.2d 1531 (2d Cir. 1989), the Second Circuit recently addressed the issue of whether steamship carriers are employers subject to withdrawal liability under the MPPAA. The appellant steamship carriers challenged two lower court determinations that the carriers were MPPAA employers subject to withdrawal liability when they ceased operations in the Port of New York.[2] The Second Circuit initially considered the definition of the word employer within the meaning of the MPPAA. After analyzing both the statutory language and the objectives of the MPPAA, the Second Circuit adopted the definition of employer established by the district courts. The Second Circuit found that "the term employer in [the MPPAA] means 'a person who is obligated to contribute to a plan either as a direct employer or in the interest of an

employer of the plan's participants.'" *Korea Shipping*, 880 F.2d at 1537 (quoting district court, 663 F. Supp. at 770).

Having concluded that the "contributing obligor" definition of employer was proper under the MPPAA, the Second Circuit addressed the issue of whether the steamship carrier appellants had such an obligation. Like PM&O, the appellants argued that they did not have an obligation to contribute to the pension plan. One appellant argued that payment of the tonnage assessments was the stevedore's obligation. *See Korea Shipping*, 880 F.2d at 1539. The other appellant argued that the payments it made to the NYSA were "cargo assessments" and not obliged contributions to the plan. *See id.* The Second Circuit rejected these arguments, reasoning that the express terms of the GCA imposed an obligation to contribute on the steamship carriers.

> [T]he [GCA] states that "[e]ach vessel carrier . . . shall be responsible for an assessment amount per ton on each ton of non-excepted cargo loaded or discharged in the Port of New York," that those assessments "shall be paid to NYSA for immediate transmittal to the NYSA-ILA Fringe Benefits Escrow Fund," and that "[p]ension payments shall be made by NYSA directly to the NYSA-ILA Pension Trust Fund." These contractual provisions amply support the conclusion that the stevedores and the NYSA were merely conduits for monies which the carriers were obligated to pay into the longshoremen's pension fund.

*Id.* at 1539.

PM&O tries to distinguish *Korea Shipping* on its facts, arguing that the Second Circuit relied on the carriers' status as *members* of the NYSA in imposing withdrawal liability. *See* Letter of Peter M. Panken, at 2, 86 Civ. 8647 (JMC) (S.D.N.Y. Aug. 2, 1989). PM&O argues that as it was never a member of the NYSA, the reasoning in *Korea Shipping* does not apply. The Court finds this distinction to be inconsequential. In *Korea Shipping*, the Second Circuit noted that the carriers were parties to the GCA "not only by reason of their membership in the NYSA, *but also as direct signatories*." *Korea Shipping*, 880 F.2d at

1534 (emphasis added). Thus, the fact that the carriers were *parties* to the GCA was significant to the Second Circuit. Whether they were parties because of membership in the NYSA or because they were direct signatories to the collective bargaining agreement was not the basis for the Second Circuit's decision.

PM&O was a direct signatory to the GCA. *See* Bower Affidavit, ¶ 11. As such, PM&O had an obligation to contribute to the pension fund and was an employer within the meaning of the MPPAA. *See Korea Shipping*, 880 F.2d at 1539. PM&O is therefore subject to withdrawal liability under the MPPAA. Accordingly, defendants' motion for summary judgment is granted. Fed. R. Civ. P. 56. Plaintiff's cross-motion for summary judgment is denied. Fed. R. Civ. P. 56.

II. *Refund Claim*

In addition, PM&O seeks a refund from defendants for all assessments it paid into the Pension Fund during its tenure at the Port of New York. PM&O claims that such assessments were paid under "a mistake of fact and/or law," Complaint, ¶ 1, and that the money should be refunded pursuant to section 403 of ERISA. Section 403 implies a private right of action in favor of an employer for the return of contributions mistakenly paid to a pension fund. *See* Award Service, Inc. v. Northern California Retail Clerks Unions & Food Employers Joint Pension Trust Fund, 763 F.2d 1066, 1068 (9th Cir. 1985).

PM&O first argues that its payments were based on a "mistake of fact." This supposed mistake was the erroneous belief that its payments were merely tonnage assessments and not contributions to the Pension Fund. This argument, however, was expressly rejected by the Second Circuit in *Korea Shipping*. *See* 880 F.2d at 1539 (rejecting argument that payments made to the NYSA were "cargo assessments" and not contributions to the pension fund).

In addition to the mistake of fact argument, PM&O maintains that the assessments were paid pursuant to a "mistake of law." PM&O appears to argue that its "mistake of law" was an

erroneous belief as to the legality of the subscription provisions of the collective bargaining agreement. The master contract of the collective bargaining agreement provides: "If any carrier does not subscribe to this Agreement . . . the ILA shall have the right not to work on the loading and discharging of its ships or any work ancillary thereto." *Master Agreement*, September 26, 1983, at 3. The GCA has a similar subscription provision. *See General Cargo Agreement*, October 1, 1980 to September 30, 1983, at 74. PM&O claims that, in acordance with these provisions, it was informed that unless it subscribed to the collective bargaining agreements, no longshoremen would service its ships.

The essence of PM&O's argument is not a claim of mistaken contributions to the Pension Fund. Rather, PM&O asserts that the subscription provisions of the collective bargaining agreement were unlawful under section 8(e) of the National Labor Relations Act ["NLRA"], 29 U.S.C. § 158(e) (1982),[3] and that its "mistake of law" was that it did not know of the illegality. As a result of this alleged illegality, PM&O seeks a refund pursuant to section 403 of ERISA.

As a threshold matter, however, before the Court can even reach the merits of PM&O's illegality claim under section 8(e) of the NLRA, the Court must determine, as a matter of law, whether PM&O is permitted to raise the claim of illegality. In the instant action, PM&O is attempting to raise the claim of illegality to obtain affirmative relief. Usually, however, a claim of illegality is raised by an employer as a defense to a delinquent contribution action brought by a pension fund trustee. *See, e.g.*, Southwest Administrators, Inc. v. Rozay's Transfer, 791 F.2d 769, 773 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987). In delinquent contribution actions, the pension fund trustee, as a third-party beneficiary of the collective bargaining agreement, is generally subject to any contract defense available against the contracting parties themselves. *See* Southern California Retail Clerks Union & Food Employers Joint Pension Fund v. Bjorklund, 728 F.2d 1262, 1265 (9th Cir. 1984). For public policy reasons, however, a collective bargaining agreement is not considered a typial third-party beneficiary contract and traditional

contract defenses are severely curtailed. *See Southwest Administrators*, 791 F.2d at 773. Thus, in Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960), the Supreme Court precluded an employer from raising the union's violation of a no-strike clause in a collective bargaining agreement as a defense to a trust fund collection action based on the same agreement. *See id.* at 494-96.

An employer, however, is not precluded from raising all defenses on the contract. In Kaiser Steel Corp. v. Mullins, 455 U.S. 72 (1982), the Supreme Court allowed an employer to assert an illegality defense in a delinquent contribution action. The collective bargaining agreement at issue contained a provision requiring the employer to report its purchases of coal from producers who were not under contract with the union and to make contributions based on each ton of coal purchased from such non-union producers. *See id.* at 74-75. The employer argued that this provision was unenforceable because it violated the antitrust laws and section 8(e) of the NLRA. The Supreme Court allowed the employer to raise the defense, reasoning that, unlike *Benedict Coal*, the provision in question was not a collateral matter. *See id.* at 86. The Supreme Court found that the *very promise sought to be enforced*, the promise to contribute, was itself alleged to be illegal. *See id.* at 88.

Turning to the instant action, the Court finds that, as a matter of law, PM&O should not be allowed to raise the alleged illegality of the subscription provisions in an attempt to obtain a refund. First, as mentioned above, PM&O is affirmatively using the claim of illegality to obtain a refund for contributions already paid to the Pension Fund. In *Kaiser*, where the employer raised illegality in a defensive posture, the Supreme Court specifically noted that "[a] defendant proffering the defense seeks only to be relieved of an illegal obligation and does not ask any affirmative remedy based on the . . . labor laws." *Id.* at 81 n. 7. If the Court granted PM&O's refund claim it would be providing PM&O with an affirmative remedy for an unfair labor practice. The Supreme Court noted, however, that "only the [National Labor Relations] Board may provide affirmative remedies for unfair labor practices. . . ." *Kaiser*, 455 U.S. at 86.

Second, unlike *Kaiser* where the contribution clause itself was attacked as illegal, PM&O questions the legality of the subscription provisions and, in turn, the entire collective bargaining agreement. The Supreme Court, in *Kaiser*, distinguished its decision from Huge v. Long's Hauling Co., 590 F.2d 457 (3d Cir. 1978), *cert. denied*, 442 U.S. 918 (1979), a circuit court case where the employer made an argument similar to the one asserted by PM&O. In *Huge*, the collective bargaining agreement contained a provision requiring that the transportation of coal could only be contracted out to a contractor employing union members. *See id.* at 458. The employer attempted to defend a delinquent contribution action by arguing that this provision violated the antitrust laws and section 8(e) of the NLRA, rendering the entire agreement unenforceable, including the promise to contribute. The court refused to allow the employer to interpose this defense, stating that

> [a]lmost invariably, when faced with a suit to compel employer payments to union welfare or pension funds, the courts have disallowed defenses sought to be interposed by employers to enforcement of the contract based on such ground as failure of consideration, existence of parol evidance to establish a different agreement, fraud, misrepresentation, and duress on the part of the union.

*Id.* at 464 (Adams, J., concurring) (footnote omitted).

The Supreme Court in *Kaiser* noted that its decision did not conflict with decisions such as *Huge* and *Benedict Coal*, because in those decision the promise to contribute, the very promise sought to be enforced, was not claimed to be illegal.[4] *See Kaiser*, 455 U.S. at 88. PM&O, like the employer in *Huge*, seems to argue that the entire agreement, and consequently the promise to contribute, is unenforceable because of the allegedly illegal subscription provisions. PM&O, however, does not argue that the promise to contribute is itself illegal. The Court finds that, based on the Supreme Court's acceptance of cases such as *Huge*, PM&O should not be able to raise the claim of illegality under the instant circumstances.

In addition, a rule which precludes an employer such as PM&O from raising illegality in this situation, comports with the public interest in protecting union welfare and pension funds. In *Huge*, the court noted that a rule preventing the employer from raising the claim of illegality

> forces an employer to disclose promptly any problems that may exist in its undertaking to provide for its employees health and retirement needs, rather than create false impressions in the minds of its employees regarding the compensation they are entitled to receive. It thus forecloses the possibility that an employer will surprise its employees by revealing at a late date that it was not legally bound to provide for contingencies that may afflict them or their families in the future. The employer may still have its claims adjudicated by bringing, in the proper forum, a timely suit against the union for rescission of the contract, antitrust damages, or a declaration that an unfair labor practice has been committed, as the case may be.

*Huge*, 590 F.2d 465 (Adams, J., concurring).

Finally, the Court finds that the result reached in the instant action is supported by the reasoning set forth in Chicago District Counsel of Carpenters Pension Fund v. Dombrowski, 545 F. Supp. 325 (N.D. Ill. 1982), a case with similar facts. In *Dombrowski*, the pension trustees brought an action for delinquent contributions. The employer defended on the ground that he signed the collective bargaining agreement under duress. *See id.* at 326. Thus, the employer argued that his promise to make pension fund contributions was unenforceable because the collective bargaining agreement itself was unenforceable. The court considered the Supreme Court's decisions in *Benedict Coal* and *Kaiser*, as well as the underlying policy interests, and concluded that the defense should be barred. *See id.* at 328. The court noted that if the employer believed he was coerced into signing the collective bargaining agreement, he should have brought

an action against the union. *See id.* Similarly, if PM&O believed it was illegally forced to subscribe to the collective bargaining agreement, its remedy is against the union, not a refund from the Pension Fund.

For all of the foregoing reasons, PM&O's request for a refund pursuant to ERISA section 403 is denied.

## CONCLUSION

Defendants' motion for summary judgment is granted. Fed. R. Civ. P. 56. Plaintiff's cross-motion for summary judgment is denied. Fed. R. Civ. P. 56. As plaintiff has demanded arbitration pursuant to ERISA, 29 U.S.C. § 1401, and there being no objection from defendants, the parties shall proceed to arbitration to determine the amount of plaintiff's withdrawal liability. This action is hereby stayed pending arbitration.

SO ORDERED.

/s/ John M. Cannella

JOHN M. CANNELLA
United States District Judge

Dated: New York, New York
December 26, 1989

## FOOTNOTES

1. Additional defendants are the New York Shipping Association, the International Longshoremen's Association, AFL-CIO, and the NYSA-ILA Fringe Benefits Escrow Fund.

2. In *Korea Shipping*, two lower court cases were consolidated on appeal.

3. Section 8(e) of the NLRA was designed to outlaw provisions in collective bargaining agreements (so called "hot-cargo" clauses) where an employer agrees to cease handling the products of other employers who do no comply with union standards or recognize a union. *See* Local 210, Laboreres' Int'l Union of North America v. Labor Relations Div. Associated General Contractors of America, 844 F.2d 69, 72 (2d Cir. 1988) (citing cases).

4. The Supreme Court also distinguished *Kaiser* from Lewis v. Mill Ridge Coals, Inc., 298 F.2d 552, 556 (6th Cir. 1962), where the Sixth Circuit rejected the employer's argument that its promise to pay royalties was unenforceable because the contract failed for lack of consideration.

NATIONAL LABOR RELATIONS BOARD
REGION 2
Federal Building, Room 3614, 26 Federal Plaza
New York, New York 10278

Telephone 264-0300

March 31, 1986

International Longshoremen's Association, AFL-CIO
Att: Herzl Eisenstadt, Esq.
17 Batter Place
New York, NY 10003

Re: Philippines, Micronesia & Orient
Navigation Co.
Case No.: 2-CA-21420

Dear Mr. Eisenstadt:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation it does not appear that further proceedings on the charge are warranted.

The evidence fails to establish that the above-named Employer violated Section 8(a)(1) and (5) of the National Labor Relations Act by refusing to bargain with you as the representative of longshore unit employees over the effects of the employer's decision to cease its shipping operations in ports where you have jurisdiction. The evidence established that the Employer executed a collective-bargaining agreement with you in which it agreed to recognize the ILA as the exclusive collective-bargaining representative of the stevedores unloading its ship when it entered the Port of New York. The evidence established that the Employer employed no stevedores directly, but subcontracted with a company to provide the services of stevedores. The Employer paid money into funds for the stevedores' benefit based upon the tonnage unloaded at the dock by the stevedores. While

you contend that the collective bargaining agreement established the Employer as a joint employer with the stevedore contractors, I do not believe that under Board law there is a sufficient basis for such a finding. Thus the employees performing stevedoring work were supervised solely by the stevedoring companies and not by the Employer. However, the evidence herein established that even assuming that the joint employer relationship could be found, the Employer's obligation concerning remuneration to the stevedores is based solely on the amount of cargo handled by the stevedores. Therefore, the contract contemplates, by its terms, that should the tonnage be reduced to zero, the Employer's obligation to the sub-contracted stevedores would similarly be zero. The effects of that reduction or elimination is therefore encompassed within the bargain agreed to by parties and there is no further obligation to bargain, over the "effects" of the reduction in the Employer's utilization of stevedores.

Finally, the evidence does not establish that the Employer violated the Act in any other manner encompassed by the charge. Accordingly based on the above, I am refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D. C. 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on April 14, 1986. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington, and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each

of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessitiy for filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

/s/Daniel Silverman
Daniel Silverman
Regional Director

Enc.
CERTIFIED MAIL
R.R.R.

cc: General Counsel
National Labor Relations Board
Washington, D. C. 20570

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